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Supreme Court of the United States

October Term, 1972

NO. 72-915

DANIEL WYATT, *Petitioner*

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IMMIGRATION AND NATURALIZATION SERVICE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Daniel Wyatt, Petitioner, prays that a Writ of Certiorari isuse to review the judgment of the United States Court of Appeals for the Fifth Circuit dismissing the above-entitled case on September 12, 1972.

CITATIONS TO OPINION BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit is printed in Appendix A hereto, *infra*, p. 8, and is reported in ____ F.2d ____.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 12, 1972. Upon application duly filed therefor, Mr. Justice Powell ordered on December 12, 1972, that the time for filing this petition for the writ of certiorari be extended to and including December 22, 1972. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether an alien can be deported under 8 U.S.C. 1251 (a)(11), solely on grounds that he was convicted of violating the transfer tax provisions of the Marihuana Tax Act [26 U.S.C. § 4744(a)(2)] which, this Court has held, ". . . dealt with the kind of conduct that cannot constitutionally be punished in the first instance."

STATEMENT OF THE CASE

Petitioner is a 25-year-old native and citizen of Ireland. He entered the United States on July 22, 1964, for permanent residence. For the past four years, he has been a self-supporting student, from time to time, majoring in physics at the University of St. Thomas in Houston, Texas. On December 2, 1968, he was convicted upon his plea of guilty in the United States District Court for the Southern District of Texas, Laredo Division, of the offense of unlawfully transporting, concealing, and facilitating the transportation and concealment of a quantity of marijuana without having paid the transfer tax, in violation of 26 U.S.C. § 4744(a)(2). Petitioner was sentenced to five years imprisonment, sentence suspended, and he was placed on probation for five years without supervision. In

said sentence, the Court also "recommended that the (petitioner) be deported from the United States, and not be allowed to make application for return during the period of Probation."

Following such recommendation, the Immigration and Naturalization Service commenced deportation proceedings against Petitioner. Petitioner filed a Petition for Review of the Deportation Order of the Service, raising the same issue presented here, before the United States Court of Appeals for the Fifth Circuit which, on September 12, 1972, without written opinion, granted the Service's motion to dismiss. Thereupon, he was ordered to be ready for deportation on September 27, 1972, when this Court, on application of counsel for Petitioner, stayed his deportation on September 25, 1972, ". . . pending further order of this Court when the response of the Solicitor General is received." The Solicitor General has not yet responded, apparently awaiting the filing of this Petition.

REASONS FOR GRANTING WRIT

The facts of this case squarely present the important question whether a statute defining criminal conduct, if declared unconstitutional, is void *ab initio.*

The conviction and sentence pursuant to which Petitioner is on probation and subject to immediate deportation proceedings were imposed in violation of Petitioner's Fifth Amendment privilege against self-incrimination, as explicitly defined by this Court in *Leary v. United States,* 395 U.S. 6 (1969), decided some five months after Petitioner was convicted, viz., on May 19, 1969. The *Leary* decision involved, as does this case, the question whether Leary's conviction for failing to comply with the transfer

tax provisions of the Marihuana Tax Act violated his Fifth Amendment privilege against self-incrimination. In deciding the question affirmatively, this Court traced the history of precedent cases entailing similar problems. In *Marchetti v. United States,* 390 U.S. 39 (1968), the Court held that a plea of the Fifth Amendment privilege provided a complete defense to a prosecution for failure to register and pay the occupational tax on wagers, as required by 26 U.S.C. §§ 4411-4412. In *Grosso v. United States,* 390 U.S. 62 (1968), the Supreme Court held that the same considerations required that a claim of the privilege be a defense to prosecution under 26 U.S.C. § 4401, which imposes an excise tax on proceeds from wagering. And in *Haynes v. United States,* 390 U.S. 85 (1968), the Court held that assertion of the Fifth Amendment privilege for the same reasons provided a defense to prosecution for possession of an unregistered weapon under the National Firearms Act, 26 U.S.C. § 5851.

In Part I (E) of this Court's *Leary* decision, the Court held that,

> "Although it would have been preferable for petitioner to have asserted the privilege at trial, we hold that in the circumstances of this case his failure to raise the issue at that time did not amount to a waiver of the privilege. See *Grosso v. U. S.*, 390 U.S. 62, 70-71 (1968)."

The aspect of the self-incrimination privilege which was involved in the *Leary* case, and which Petitioner asserts here, is the right *not* to be criminally liable for one's previous failure to obey a statute which requires an incriminatory act; i.e., the right to exemption from conviction for having failed to comply with the transfer provisions

of the Act at the time he acquired marijuana in 1968. The Fifth Circuit Court has held in *Lucia v. United States,* 416 F.2d 920 (1969),

> "The Supreme Court has repeatedly held that a party cannot be said to waive a right that was judicially created *after* the supposed waiver . . . These defendants should not be required to anticipate the Supreme Court action overruling *Lewis* and *Kahriger* and be compelled to make the futile gesture of raising the privilege at trial to preserve their rights in the event of an overriding decision. We believe the effect of the Supreme Court decisions in *Marchetti* and *Grosso* is to prevent enforcement of the wagering statutes as they are now designed because of the substantiality of the risks of incrimination . . . We conclude that Lucia's failure to raise the self-incrimination defense in the trial court and his plea of guilty did not prevent his raising the point in the present action . . . "

And this Court has held, in applying the Marchetti-Grosso rule retroactively,

> "Unlike some of our earlier retroactivity decisions, we are not here concerned with the implementation of a procedural rule which does not undermine the basic accuracy of the factfinding process at trial . . . Rather *Marchetti* and *Grosso* dealt with the kind of conduct that *cannot constitutionally be punished in the first instance* . . . (T)he conduct being penalized is constitutionally immune from punishment. No circumstances call more for the invocation of a rule of complete retroactivity."

United States v. United States Coin and Currency, 1971, 91 S.Ct. 1041, 1045.

The Fifth Circuit Court has said, in *Harrington v. United States*, 444 F.2d 1190, 1192-3 (1971):

> ". . . Since the first part of *Leary*—i.e., that dealing with the constitutionality of the transfer tax provisions of § 4744—and *Marchetti-Grosso* are but variations of a single theme, both must be retroactive. Since Harrington was convicted for violating the statute overturned in the first part of *Leary*, that count of the conviction cannot stand . . . This Court cannot charge persons convicted under the tax count with knowing that *Leary* would be retroactive, when we ourselves were uncertain of the eventual outcome. Therefore, Harrington's motion to vacate his conviction and sentence under 26 U.S.C.A. § 4744(a) (1) must be granted."

Mr. Justice Brennan said in the *Coin and Currency case*, 91 S.Ct. 1041, 1047, in treating an unconstitutional statute as void *ab initio*:

> ". . . (A) decision holding conduct beyond the power of government to sanction or prohibit must be applied to prevent the continuing imposition of sanctions for conduct engaged in before the date of that decision. For the decision does far more than cast doubt upon the reliability of the guilt-determining process. It makes the question of reliability irrelevant, for it establishes beyond peradventure that the government has no legitimate interest in punishing such conduct at all . . . Accordingly, it may no longer continue to punish it."

CONCLUSION

Because the Immigration and Naturalization Service is continuing to attempt to impose sanctions against Petitioner predicated upon his invalid conviction, this Court

should clarify and define the scope of consequences, *if any*, that may flow from a conviction under a statute that is subsequently invalidated, and therefore grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of December, 1972, a copy of the foregoing Petition for Writ of Certiorari was served upon the Solicitor General by mailing same to the Hon. Erwin Griswold, Office of the Solicitor General, United States Department of Justice, Washington, D.C. 20530, postage prepaid.

Ben G. Levy

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2617

DANIEL WYATT, *Petitioner,*

versus

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*

Petition for Review of An Order of the Immigration and Naturalization Service (Texas Case)

(Filed September 12, 1972)

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that respondent's motion to dismiss the petition, filed in the above styled and numbered cause, is hereby GRANTED.

